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CONSPIRACY IN FRAUDULENT ENTRIES OF GOVERNMENT LAND.

A late decision by the Eighth Circuit Court of Appeals does not necessarily involve the question whether the statute of limitations begins to run as to the offense of conspiracy from the time of the first overt act or from the last. Lonabaugh v. United States, 179 Fed. 476. It assumes that the latter is the case and then rules that in a conspiracy to defraud the United States by procuring fraudulent entries of government land, nothing can be regarded as an overt act in furtherance of such conspiracy which follows upon the parting with title by the government to land procured to be fraudulently entered.

The situation in the Lonabaugh case was that the indictment charged that Lonabaugh and his associates entered into a conspiracy to defraud the government of the title to various quarter sections of its public lands by means of entries under the homestead laws, which entries were to be apparently for the benefit respectively of the entrymen, but really and fraudulently for the benefit of a corporation.

The last overt act prior to the parting with title by the government to land connected with any entry was claimed by the defense to have been more than three years before the finding of the indictment, while the government contended that as patent had issued within this period it constituted an overt act and therefore there was no bar.

The court said: "Of the issuance of the patents little need be said. It was not the act of one or more of the conspirators, but of the officers of the Land Department at Washington, who were acting solely in behalf of the United States. And while it doubtless was induced by what the conspirators had done in giving to the entries a lawful appearance when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."

This ruling may be correct, but we think there is much to be said on the other side. An overt act is an act done by the conspirators or one of them in furtherance of a conspiracy *dum fervet opus*. Up to the very instant a patent issues the conspiracy in this case was on, and there is no doubt that the doing of what was to be done by the government officers was the very pith of the whole matter.

It seems certain that, if one or more conspirators induce another innocently to do something which is to further the success of a conspiracy what he does may be an overt act by the conspirators. Thus suppose there is a conspiracy to murder and one of the conspirators induces a third party to write a letter to the intended victim to meet him at a certain place and time, the plan being to assassinate from ambush while he is on the way. Would not the writing of the letter be an overt act by the conspirators? If one were intimidated by a conspirator into the doing of a certain thing in furtherance of a plot, would not his compliance be the overt act of a conspiracy? Why, then, should not the acts of these officials induced by fraud stand on the same footing?

These observations, however, are not upon a question as interesting, as the matter appears to us, as that of a federal indictment charging a single conspiracy in the procuring of fraudulent entries upon more than one quarter section of land subject to acquisition by entrymen.

In limiting the pertinency of such a question to a federal indictment we strip consideration of all that might be urged in respect to courts, where, in the absence of a restrictive statute, conspiracy is punishable as a common-law offense. It is indisputable doctrine, that there are no common-law offenses against the United States, and, therefore, that conspiracy without overt acts is outside of federal legislation. See Conspiracy 6 Am. & Eng. Encyc. Law, 837.

Further it is to be said that Section 5440, U. S. R. S., upon which indictments for conspiracy for fraudulent land entries are predicable, specifically provides for an overt act as a necessary ingredient of crime. The word "conspire," however, in this section must be taken in its common-law sense, as has often been said by courts as to federal statutes employing common-law terms.

The word "conspiracy" is said to be more easily described than defined, and its description declares that "a criminal conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." Id. page 832.

Reverting again to the proposition that nothing is unlawful or criminal so far as the United States, as a sovereignty, is concerned, unless legislation specifically so provides, then we deduce the conclusion that there can be no defrauding of the United States so that it can punish therefor, unless by the violation of one of its enactments.

Section 5440, it is true, denounces conspiracy "to commit any offense against the United States or to defraud the United States in any manner or for any purpose," but, as general as this language is, it must, for purposes of construction, be referable to the limited legislative power of Congress. If one defraud the United States and there is no statute violated, it might be that prosecution would lie in a state court, but certainly not, we think, in a federal court.

Take, then, a prosecution for a conspiracy to procure fraudulent entries by pretended bona-fide entrymen to absorb for a third party ten thousand acres of the public domain, and it may be asked what statute can be violated by such a conspiracy? There is no means under the homestead laws by which, either honestly or fraudulently, such a body of land as an entirety may be made to pass from under the possession and ownership of the United States.

But there is a means whereby a purpose on the part of the third person to acquire contiguous lands may be accomplished by various fraudulent entries, and it is the making of separate entries fraudulently, that the government denounces as an interference with the proper distribution and occupancy of its public domain.

The specific offense, therefore, that one may commit is to fraudulently enter and acquire title to some subdivision of the public land subject to entry, and each entry is wholly disconnected from, and independent of, any other.

What then is the legal effect of a scheme to procure fraudulent entries upon a number of subdivisions of the public land? It is undoubtedly true, that a conspiracy to procure a fraudulent entry upon a single subdivision, if followed by an overt act, is indictable in a federal court. And it is also true that an indictment may have different counts for as many fraudulent entries as there are subdivisions, but can they be lumped together in one count?

It seems to us that there are as many unlawful objects as there are fraudulent entries, and it is of no legal concern to the government that, when the separate offenses shall have been consummated, the third person is to make of separate tracts of land an entirety.

It is true that, if one fraudulent entry on the government is punishable as an interference with its policy of land distribution, two or more entries also are, but no statute has said that a combination to make fraudulent entries is punishable. Therefore a conspiracy for a combination of entries is not denounced.

If the view that a plan to procure a number of fraudulent entries is separable into as many conspiracies as there are overt acts in several entries, then it follows, that the beginning of the running of the statute of limitations as to one fraudulent entry is wholly disconnected with such beginning in another.

The case of Ware v. United States, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, shows, in its statement of facts, more clearly that the scheme to absorb a

large body of land was the conspiracy charged, than the Lonabaugh case does, and the question of the time limitations began to run was more directly involved. It also seems that the question, as here suggested, was, by necessary implication, there ruled against, or, at least, the opinion more pointedly discusses the question as the only basis for the ruling that was made.

NOTES OF IMPORTANT DECISIONS

JURISDICTION — MANDAMUS TO REQUIRE TRIAL COURT TO HEAR PLEA IN ABATEMENT.—If the requirement of the Nevada code that "the defendant either demur or answer, and in his answer set up as many defenses as he may have" means that the defendant does not have the right to appear specially in a plea in abatement and prove his averments of fact, as the Supreme Court of Nevada holds, then it seems to us to be, in this respect, quite a lame sort of code. See McKim v. District Court, 110 Pac. 4.

The nature of the case, in which the filing of the plea in abatement was not permitted, should have appealed quite strongly for such permission, and, therefore, the ruling that was made may be said to be squarely upon principle.

The statement of facts shows that a wife had instituted her suit for divorce in Nevada, and the husband "served notice upon the plaintiff that upon a time certain he would move the district court for an order permitting him to appear specially in the action for the purposes of filing a plea in abatement, raising the question of the jurisdiction * * * to try the action for divorce upon the ground that the plaintiff was * * * not a bona fide resident" of Nevada. The motion being denied, the husband asked the supreme court for a mandamus nisi and that the district court be restrained from further proceeding in said cause. The supreme court dismissed the proceeding.

The opinion said: "It is the duty of the court in divorce proceedings to see that the proof of residence is clear and convincing; and that a fraud is not being perpetrated on the court. Having attempted to attack the validity of the plaintiff's residence, although in a manner not recognized by our procedure, the trial court will doubtless permit the defendant a reasonable opportunity to file an answer in the case." By this it is perceived that before the defendant may be permitted to show there is no jurisdiction he must formally submit to jurisdiction by a personal appearance, even though it is the duty of the court in this class of cases to see that jurisdiction exists before it goes into the merits.

But it cannot be true that such provisions of the Nevada code as the court refers to intend to exclude pleas in abatement, or at least any plea in abatement that goes to the jurisdiction of the cause. A plea in abatement goes either to the jurisdiction of the court, the competency of the parties as suitors or the sufficiency of the writ. 1 Am. & Eng. Ency. of Law & Practice, 20. The first two of these reasons may as well depend on a question of fact as they may appear on the face of the petition. If they exist at all, no case is rightly in court either for demurrer or answer. What the Nevada code ought to mean and which, we believe, it must have been intended to mean, is that, in suits brought by competent parties, on a sufficient writ regarding a subject matter within a court's jurisdiction, the only pleadings allowed to defendant are demurrer and answer, and, if in Nevada the common law has been adopted, procedure to show want of jurisdiction, competent parties or sufficient writ has not been abrogated. Reading this case helps one to understand the unenviable eminence of Nevada as a resort for weary nonresident bearers of matrimonial yokes, to say nothing of its magnificent distances in the background of a fistic arena.

PRINCIPLES OF PRACTICE REFORM.*

In the belief that it is of the first importance in all reform of procedure to settle the principles upon which reform is to be carried out and the lines along which it is to be achieved, the committee desires to submit a preliminary draft of such principles. Some of the principles hereinafter reported were submitted in the report of last year, and are now placed in their proper position in a larger scheme. In the report last year, the committee dealt also with or-

*This splendid article was prepared by the author for the benefit of the Special Committee of the American Bar Association, appointed to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. In some respects, Mr. Pound's suggestions do not carry our full approval. Our idea as to the first pleading is that it being the foundation not only of the suit between the

ganization of courts and of judicial business. At present it has nothing farther to report upon that subject, having confined its attention to purely procedural reform.

I. A Practice Act should deal only with the General Features of Procedure and Prescribe the General Lines to be Followed, leaving Details to be fixed by Rules of Court, which the Courts may change from time to time as actual Experience of their Application and Operation Dictates.—This principle, which the committee regards as the first and most fundamental in a program of procedural reform, is argued fully in the report of last year.[1] It is also discussed at length in two papers by one of the members of the committee.[2] The only noteworthy argument to the contrary with which the committee is acquainted, is in an address of Hiram T. Gilbert, Esq., of Chicago, before the Illinois State Bar Association.[3] Since the last report was written, the principle has been applied in the new federal copyright act,[4] and also in the act just passed providing for a Court of Commerce.

II. In Framing a Practice Act or Rules thereunder, Careful distinction should Be made between Rules of Procedure intended Solely to provide for the Orderly Dispatch of Business, Saving of Time and Maintenance of the Dignity of Tribunals, on the One Hand, and Rules of Procedure intended to secure to all Parties a fair opportunity to meet the case against them and a Full Opportunity to Present their own Case, on the Other Hand; Rulings on the Former should be Reviewable only for Abuse of Discretion, and Nothing Should depend on or be obtainable through the latter except the securing of such Opportunity.—A leading principle which those who draw up a practice act should have in view should be *to make it unprofitable to raise questions of procedure for any purpose except to develop the merits of the case* (*i. e.*, the rights given by the substantive law) to the full. Much may be done in this direction by distinguishing between rules intended to secure the orderly dispatch of business on the one hand, and rules intended to protect the substantial rights of the parties, on the other hand. The former ought to be no concern of the parties, unless under exceptional circumstances. It should be for the tribunal, not the party, to object in such cases, and decisions with respect to such rules should be reviewable only for abuse of discretion. This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time and not in the interest of the parties. But there are other rules resting upon the same basis which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In all such cases how far the rules should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there

parties but of the jurisdiction or right of the court to hear and determine the question submitted, should clearly and accurately define the exact limitation of the subsequent litigation not only for the benefit of the parties themselves but for the benefit of the state and third parties and in the interest of a safe record for purposes of lis pendens, collateral attack and res adjudicata. With this single insistence on the old fundamental principle that what is not juridically presented shall not be judicially decided we find much to approve in the very ingenious suggestions of Professor Pound.

EDITOR.

(1) 34 Rep. Am. Bar Association, 578, 595-600.

(2) Some Principles of Procedural Reform, 4 Ill. Law Rev. 388, 403 ff.; A Practical Program of Procedural Reform, Proc. Ill. State Bar Ass'n, 1910, Green Bag, August, 1910.

(3) The Administration of Justice in Illinois, Proc. Ill. Bar Association, 1909, 328.

(4) Chap. 320, 35 Stat. U. S. 1075, §25; See 214 U. S. 533.

must be an absolute rule or no rule in these cases also, as if substantive rights depended upon them.

With respect to all other rules of procedure, nothing should be made to depend upon them beyond securing to each party his substantive rights—a fair chance to meet his adversary's case and a full opportunity to present his own. No party should be permitted to defeat his opponent, or to throw him out of court and compel him to begin anew because of them. He should be able to use them simply to obtain a fair opportunity of meeting the case against him and of making his own case. In other words, rules meant to save time and advance the business of the court should not be permitted to waste time and obstruct the business of the court by becoming the subject of contest between the parties, and rules meant to protect the parties should be available to achieve that end and for no other purpose. Being of no avail as substitutes for substantive points, they will tend to lapse into disuse. Only when something depends upon them, will use be made of them. The stock answer to this argument has always been that our judges are not English judges and our lawyers are not English lawyers. There is a degree of weight in this. But the judge need have no more discretion than he has now, with respect to rules intended to protect the parties, and yet the parties may be limited to use of those rules in such way as to secure fair notice of the case against them and fair opportunity to present their own case, and nothing more; the trial judge need have no additional powers, and yet the rules he administers may require parties to use procedural rules, not to lay the foundation of an appeal in the future, but to obtain a substantial right in the present.

III. The Sole Office of Pleadings Should Be to Give Notice to the Respective Parties of the Claims, Defenses and Cross-Demands Asserted by Their Adversaries; the Pleader Should not Be Held to State All the Elements of Claim, Defense or Cross-Demand, but merely to Apprise His Adversary fairly of What Such Claim, Defense or Cross-Demand Is to Be.—So far as possible, courts should be enabled to try the case, not the record. After trial, the questions should be: (1) Does the case made warrant the judgment or some other judgment? (2) Was the party complaining fairly notified of the case against him and given a fair opportunity to meet it?—requiring him, of course, to make some showing that he really had a meritorious case to present and so was prejudiced. Equity acts on the latter principle in case of injunctions against judgments improperly obtained and courts of law act on it in setting aside judgments by default or confession. It should be applied to questions of procedure generally, where a litigant asserts he was deprived of some procedural right. As to the first question, it is submitted that when pleadings have served to notify the parties and trial has been had, they have fulfilled every useful function they possess and that they should not be re-examined in the same or another court to ascertain whether they—as distinguished from the case made at the trial—will technically sustain a judgment. The record may be made to show in the final event the causes of action and defenses adjudicated. Its office should be to do this, not to serve as a formal basis for the judgment.

As it stands, pleadings have four purposes: (1) The first is to serve as a formal basis for the judgment. This is the oldest function, and one that goes back before the time of rational, as distinguished from purely mechanical trial of issues. To-day there is no sound reason for retrying on the record mechanically, what has been tried rationally, on evidence by a court of jury. The case made to the latter can be and should be the subject of review. (2) Another is to separate issues of fact from questions of law. But since the oral thrashing out of the cause before the justices was superseded by written pleadings, pleadings have more and more failed to do this. To-day, they do so most imperfectly or not at all. It is rare indeed that a cause may be

disposed of finally upon the questions of law raised by a demurrer. Usually the demurrer is interposed for delay, and in other cases the practitioner, in view of the power of amendment, prefers not to "educate his opponent." (3) Another is to give to litigants the advantage of a plea of *res judicata* if molested again for the same cause. But this may be done by the court requiring the record, when judgment is finally rendered, if the pleadings do not make the matter clear, to state what claims and defenses have been adjudicated.[5] Moreover, pleadings do not perform this function or perform it very imperfectly, at present. For example, who can tell from a record in assumpsit, with the common counts, general issue, verdict and judgment, what was in issue? A system of pleadings designed solely to afford notice to the respective parties will meet this need completely. If it provides a method by which the parties have sufficient notice, we may be sure that others who have occasion to know will find it adequate. The better it fulfills the purpose of notifying the parties of the claims and defenses of their adversaries, the better a system of pleading will meet the requirement of a record by which to maintain a defense of *res judicata*. (4) *Finally*, pleadings exist to notify parties of the claims, defenses and cross-demands of their adversaries. But they do so more or less imperfectly. To a great extent they do so in form rather than in substance. For instance, the general issue, the general denial in code jurisdictions, and general replications, still allowed in some jurisdictions, often serve to conceal rather than to point out the case that will be made.

The notice-function of pleading is the one that should be emphasized. The function of serving as a formal basis for the judgment should be abandoned, and the other functions will be performed at least as well as now if the notice-function is thoroughly developed and consistently adhered to.

(5) Compare the English practice as shown in Hyams v. Stuart King (1908) 2 K. B. 696.

This principle has long obtained in many jurisdictions with respect to claims aaginst estates.[6] It is curious that in jurisdictions in which one may litigate a claim against an estate involving $37,000 (as in Thomson v. Black, *supra*) on an informal statement of claim, he cannot litigate an ordinary debt or claim for labor of a hundredth part of that amount without formal and technical pleadings. "In allowance of claims against estates, the Probate Court disregards mere matters of form and looks to the substance," Scheel v. Eidman, 68 Ill. 193. The same is true in that state in the circuit court on appeal in such cases. But if the cause arises in the circuit court, form at once becomes a consideration of the first importance. In New York, the statute provides that in probate and administration causes, orders and decrees shall not be reversed "for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby."[7] The court of appeals holds that this does away with the "presumption of injury" that obtains in ordinary cases. Matter of Newcomb, 192 N. Y. 238,254. No one objects to this. Why should we be more technical in other causes? It obtains also in several states in proceedings to adjudicate water-rights.[8] It obtains also in the Municipal Court of Chicago.[9]

Hence, without regard to English and Canadian experience, there has been abundant trial of the principle in the United States.

IV. No Cause, Proceeding or Appeal Should Be Dismissed, Rejected or Thrown out solely because Brought in or Taken to the Wrong Court or Wrong Venue, but if there is One where it may be brought or prosecuted, it should be Transferred thereto and go on there, all prior proceedings

(6) Thomson v. Black, 200 Ill. 465; Stanley v. Pence, 160 Ind. 636; Scoville v. Fisher, 77 Ia. 97; Hayner v. Trott, 46 Kan. 70; Bronze Co. v. Doty, 99 Mo. App. 195; Fitzgerald v. Union Savings Bank, 65 Neb. 97.

(7) Code Civ. Proc., Sec. 2445.

(8) See Col. Mills' Ann. Codes, §§2400 ff.; Utah, Comp. L., §§1273 ff.; Wash., Ballinger's Ann. Codes, §§4158 ff.

(9) See 4 Ill. Law Rev. 5121.

being saved.—With respect to this principle, attention should be called in particular to the matter of venue. Very many American jurisdictions have innovated upon the common law most unhappily in this regard. It was a mistake ever to introduce the idea of venue as that of a place where suit *must be brought.* This is particularly so in equity. At law, the question should be one of *place of trial,* as it was at common law, and if fixed wrongly, the cause should be transferred, if anyone asks for such order, to the proper county. See California Code Civ. Proc., Sec. 397: "The court may, on motion, change the place of trial in the following cases: I. When the county designated in the complaint is not the proper county." To the same effect: New York Code Civ. Proc., Sec. 987; Colorado Code Civ. Proc., Sec. 30; Wisconsin, Sec. 2621. But the Wisconsin Code prescribes too much in the way of machinery of the change, and all the American practice acts lay down too many rules as to where the cause *must* be tried. The question is often one of convenience, and it should be possible where parties so desire, to conduct a cause in a convenient place.

The objection to such a provision as that in Sec. 6 of the Illinois Practice Act of 1907, which begins, "It shall not be lawful for any plaintiff to sue" except in certain specified counties, is that a mistake in venue defeats the entire cause, and if at the end of a cause the Supreme Court hold there has ben suche a mistake, the statute of limitations may have run and defeated the claim. A few states try to obviate this by allowing a brief additional period in such cases. (See 25 Cyc. 1319, Note 35).

Excellent provisions on this subject may be found in Consolidated Rules of the Supreme Court of Ontario, Rule 529.

V. The Equitable Principle of Complete Disposition of the Entire Controversy between the Parties should be extended to its Full Extent and Applied to Every Type of Proceeding.—To give effect to this principle, four propositions may be suggested:

(1) *The courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.*

(2) *No cause or proceeding should fail or be dismissed for want of necessary parties or for non-joinder of parties, but provision should be made to bring them in.*

(3) *Joinder of all parties proper to a complete disposition of the entire controversy should be allowed in every sort of cause, and at every stage thereof, even though they are not all interested in the entire controversy.*

(4) *Courts should have power in all proceedings to render such judgment against such parties before it as the case made requires in point of substantive law, to render different judgments aaginst different parties or in favor of some and against others, whether on the same side of the cause or not, and to dismiss some and grant relief to or against others, imposing costs in case of misjoinder or unnecessary joinder upon the party or parties responsible therefor.*

Perhaps only the first of these propositions requires much argument. It requires that there be but one form of civil action, in which the court may grant any relief or allow any defense or cross-demand, according to the facts shown and the substantive law. It does not mean that all proceedings must be conducetd absolutely in one way. We should not force all proceedings into one rigid form, nor should we provide several different rigid moulds and force every proceeding into one of them. But it does mean that a party should not be compelled to diagnose his case in advance, try the correctness of that diagnosis with his adversary, submit to the court, not his case, but his diagnosis of it, and as like as not be thrown out and told to make another guess. In some of the code states, such proceedings are exceptional. But there is too much of this everywhere in America. In too many states, where the Chinese wall between law and equity had been torn

down, the courts put a large part of it up again. In a few, it has not been touched.

Section 69 of the New York Code of 1848 (now Sec. 3339) attempted to reach the matter by this well-known provision: "There is only one form of civil action. The distinction between action at law and suits in equity, and the forms of those actions and suits, have been abolished." To that were added provisions as to joinder of legal and equitable causes of action, and as to interposition of all defenses, legal or equitable, in all cases. Liberally construed and applied, these provisions would have done their work. But they were misinterpreted by many who assumed they were intended to "abolish equity." No such purpose exists. To unite the legal and equitable powers of courts in one *procceding* is the next step after uniting legal and equitable powers in one *court*, as was done in the federal Judiciary Act of 1789.

The English Judicature Act provided for this by a series of carefully drawn clauses in Sec. 24. But the whole is well summed up in Sub-section 7: "The High Court and the Court of Appeals, respectively, in the exercise of the jurisdiction vested in them by this act, in every cause or matter pending before them, respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them, respectively, in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties, respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The advantages of this mode of statement over that adopted in the New York Code are obvious.

A fortiori the proposition involves doing away with all separate forms of action for legal relief. An act for reforming procedure, now under discussion in Illinois, provides an elaborate scheme of distinct legal actions and proceedings. A simple scheme of distinct actions at law was provided for by the Massachusetts Practice Act. But, when the experience of the whole country is taken account of, the matter is no longer arguable. Because some of the earlier decisions under the codes, still adhered to in part of some states, insisted that the common law actions inhered in nature and could not be done away with, and hence that a party was bound inevitably to the theory of his case which he appeared to intend to put forward in his pleading, many have asserted that the provision for a single form of civil action in the New York Code was a failure. But the growing tendency in code states to-day is to do away with the doctrine of "Theory of the Case" and carry out the spirit of the code.[10] In view of such decisions, it is an anachronism to set up a system of distinct actions at law in 1910. Where separate forms of action still exist, it would be a mistake to replace them by new ones, however simple, for two reasons. (1) Experience has shown that when one system of hard and fast actions is substituted for another there is danger that the new system will outdo the old in rigidity.[11] (2) Wherever there is a separate form, men tend to assume that there is a distinct substance, whereas, the sole question aside from due notice to one's adversary, may be one of remedy. This is true particularly of equitable remedies where the question of granting them may be one of expediency in view of the particular case. The true ends to be looked to are notice to the adverse party and keeping a proper record of what has been adjudicated. Separate actions are not necessary to, nor are they the best means of, achieving these purposes.

(10) Cockerell v. Henderson (Kan.), 105 Pac. 443; Prentice v. Nelson, 134 Wis. 456; Rogers v. Duhart, 97 Cal. 500; Cole v. Jernan, 77 Conn. 374; Garkrer v. Convine, 57 Ohio St. 246.

(11) See remarks of Mr. W. B. Hornblower, quoted in 2 Andrews, American Law (2d Ed.), §635, Note 29.

VI. So far as Possible, All Questions of Fact Should Be Disposed of Finally upon One Trial.—To give effect to this principle, four propositions may be suggested:

(1) *Questions of law conclusive of the controversy or of some part thereof should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court and in any other court to which the cause may be taken on appeal, to enter judgment, either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.*

(2) *In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.*

(3) *Wherever a different measure of relief or measure of damages must be applied depending upon which view of a doubtful question of law is taken ultimately, the trial court should have power and it should be its duty to submit the cause to the jury upon each alternative and take its verdict thereon, with power in the trial court and in any court to which the cause may be taken, on appeal, to render judgment upon the one which its decision of the point of law involved may require.*

(4) *Any court to which the cause is taken on appeal should have power to take additional evidence, by affidavit, deposition or reference to a master, for the purpose of sustaining a verdict or judgment whenever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent.*

The first and the fourth of the foregoing propositions have been presented before: The first was embodied in the proposed act with respect to procedure in the federal courts submitted last year, and was approved by an overwhelming majority.[12] The fourth is discussed in the report presented last year.[13]

One of the triumphs of Judge Doe in *New Hampshire was the judicial working* out of the second proposition. His argument is: "There is no general rule that when there has been an error in a trial the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error, but not to a choice of the remedies. . . . When the erroneous part of a case is cured, the general principles of our jurisprudence do not require the application of the remedy to other parts of the case which do not need it."[14]

This rule is adopted in the revised code of Kansas.[15] It is also the English practice.[16]

VII. No Judgment should be set aside or New Trial Granted for Error as to any matter not involving the Substantive Law or the Facts, that is for Error as to any matter of Procedure, unless it Shall Appear to the Court that the Error Complained of has resulted in a Miscarriage of Justice.—This principle has been debated extensively. It has been approved twice by this Association by more than a two-thirds majority of those voting.[17] Perhaps much of the opposition thereto results from doubt as to the meaning of the term "miscarriage of justice." Of course that must mean justice according to law. What, then, is a miscarriage of justice?

It is submitted that the term should include: (a) violation of substantive law, (b) any deprivation of a right given by substantive law to insure a fair opportunity to meet an adversary's case or a full opportunity to present one's own, provided it

(12) 34 Rep. Am. Bar Ass'n, 82.

(13) See Rules of Supr. Ct. (England), Order 58, Rule 4; Kansas Rev. Code Civ. Proc., §574; 34 Rep. Am. Bar Ass'n, 598-600; 3 Ill. Law Rev. 586; 4 Ill. Law Rev. 140; 4 Ill. Law Rev. 505-506.

(14) Lisbon v. Lyman, 49 N. H. 582.

(15) Rev. Code Civ. Proc., §307.

(16) Order 39, Rule 7. As to the abuses which follow new trial of the entire cause in such cases, see Rep. N. Y. State Bar Ass'n, 1909, p. 41.

(17) 34 Rep. Am. Bar Ass'n, 82; 33 Rep. Am. Bar Ass'n, 49.

is made to appear that he had a case to present or had a real interest in meeting his adversary's case. As has been said, equity acts on the latter principle in case of void and fraudulent judgments, and courts apply it in setting aside defaults and judgments by confession. But it will be asked, How shall such a miscarriage be shown? An example is furnished by the revised code of Kansas. That act provides, in effect, that where a ground of motion for a new trial is error in the exclusion of evidence, the conventional offer of proof shall not be enough; the evidence excluded shall be produced at the hearing of the motion, by affidavit, deposition or oral evidence of the witness or witnesses, as the court may direct, and the party opposing may rebut such evidence in like manner, and no new trial shall be granted for such error unless upon the whole evidence at the trial and such evidence adduced on the hearing of the motion, the court shall be of opinion that the verdict or decision is wrong in whole or in some material part, or that the case made with respect to the evidence which was erroneously excluded, is such that that evidence ought to be submitted to a jury.[18]

In view of the universal abandonment of the "scintilla" doctrine, it is hard to see how this may be objected to.

VIII. So far as they merely reiterate objections already made and ruled upon, Exceptions Should Be Abolished; it should be enough that due Objection was Interposed at the Time the Ruling in Question was made.—Exceptions still serve a useful purpose with respect to the charge of the court, where they are in the nature of objections, and not a mere formal repetition. So completely formal are they in other cases, that the committee is advised official reporters in several jurisdictions note them as a matter of course after all rulings at the trial, without requiring them to be actually spoken.

IX. An Appeal should be treated as a Motion for a Rehearing or New Trial or for Vacation or Modification of the Order or Judgment Complained of, as the Cause may require, before another Tribunal.—At common law, after trial at *nisi prius*, the cause was heard by the court in banc upon rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure. Unhappily, the other has been followed. In consequence in ten years, 1896-1906, our courts decided 2,377 distinct points of appellate practice—almost as many as the combined points of master and servant and municipal corporations, or of carriers, constitutional law, corporations, negligence and sales added together. Indeed, appellate procedure is often the bulkiest single topic in our digests. This is wholly unnecessary. Procedure on appeal may be and should be as simple as procedure upon a motion.

Finally, as a corollary:

Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand, unless a new trial becomes necessary.

Our reports show too many cases upon construction of the mandate and construction of the opinion of the reviewing court. Wherever possible, that court should do its work completely. Enough time will be saved by a simple appellate procedure to admit of doing this.

ROSCOE POUND.

(18) Rev. Code Civ. Proc., §309.

PARENT AND CHILD—DANGEROUS EMPLOYMENT.

REAVES v. ANNISTON KNITTING MILLS CO.

Supreme Court of Alabama, December 16, 1909. (52 S. O. 142.)

Where the injury to a minor employee was caused by the negligence of her employer in not warning and instructing her as to the dangers incident to her employment, the consent of her parent to her engaging in the dangerous employment was not contributory negligence, barring recovery by the parent for loss of her wages.

McCLELLAN, J.: Counts 1, 2, and 7 as amended were those upon which the testimony was taken upon the trial. The first two rely upon the negligence of defendant (appellee) in omitting to warn and instruct plaintiff's (appellant) nine year old child, inexperienced and immature, in reference to the dangers incident to her employment in defendant's hosiery mill. The seventh count as amended ascribed the injury to the negligent failure of the defendant in respect of an uncovered, exposed shafting, rapidly revolving a short distance above and parallel with the floor of one of the rooms of the mill. This is the second appeal. Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 South, 702.

The main question now presented for review is among those decided adversely to appellee on the previous occasion. It is, under pleas H and I, whether the consent of a parent, who sues for the loss of the services, etc., of his injured minor child that the child engage in the hazardous employment in which it is injured, is chargeable with negligence, proximately contributary to its injury, and, hence, be barred of recovery in such action for the loss of services, etc., where the complaint ascribes the injury to the negligence of the master. In deference to the insistence of appellee's counsel, we have carefully reconsidered the question, and, after so doing, feel impelled to reaffirm the former ruling thereon in this case.

Reference to the numerous decisions of this court, cited and pressed upon our attention for appellee, will discover that none of them affirm the proposition that a parent's consenting to the employment of his minor child in a dangerous business includes either the assumption of risk of injury therein or affords the basis for the imputation of contributory negligence on the part of the parent in any action by the parent, where the cause of the injury is ascribable to the negligence of the master. The previous ruling rested, at least in part, upon the theory that the consent of the parent to the employment created a condition merely, and that the proximate cause for the injury was to be found in the negligent failure of the master to instruct and warn the child. The sequence, in cause of injury, cannot be ascribed to the original want of care of the consenting parent, for the reason that, as pleaded in counts 1 and 2, that dereliction of the parent was, if unaided, obviously innocent of damnifying result. The consent of the parent to the employment bore the child to a dangerous situation; but injury attended the child in consequence of the master's failure to warn and instruct, and not from the dangerous situation into which the parent had consented that the child be placed. The conclusion then announced, and now reaffirmed, is in accordance with the doctrine prevailing in this court, viz., that the proximate cause of an injury is ascribed to the act or omission subsequent, in order of effect producing the injury, to that want of care, it may be, creating the status upon which the duty last breached is erected.

Plea 3 avers the injury to have resulted proximately from dangers ordinarily incident to the service, and hence was within the general issue pleaded, and might well have been stricken on motion. Counts 1 and 2 could only be sustained by proof of injury in consequence of the negligence charged in them, and the failure to warn and instruct the child were not of the dangers ascribed in the plea.

Pleas H and I would ground contributory negligence upon consent, with knowledge, of the plaintiff that his child engage in the dangerous service described. On the facts averred, these pleas were subject to the demurrers interposed. The court erred in overruling the demurrers to pleas H and I.

Counsel for appellee insist that these pleas were apt in reply to the averment of nonconsent of plaintiff set forth in the first count. The plaintiff must prove his averment, even though unnecessarily incorporated therein, as a condition to a recovery. Tenn. C., I. & R. Co. v. Crotwell, 156 Ala. 304, 47 South. 64. But this fact will not serve to render that proximately contributing negligence, as appellee contends, which, in fact, is not so.

A number of the charges given or refused, and the court's action in respect to them, are assigned as error. What has been before said in reference to Pleas H and I will serve to indicate the proper course for the court

in dealing with charges touching that phase of the case.

Under the rule declared in Bube v. Birmingham R., L. & P. Co., 140 Ala. 275, 37 South. 285, 103 Am. St. Rep. 33, among other decisions here, the financial condition of the child is a proper element of the inquiry, in order that the jury may determine from the whole evidence the loss likely to be entailed upon the parent in consequence of the child's injury; but this does not render proper an investigation of the source of the child's estate, if such it has.

The testimony in reference to a recovery in another action by the child against this defendant should not have been admitted over plaintiff's objection. Nor did the disposition made of their wages by sisters of plaintiff's injured child tend to shed any light upon the issues in the case.

Nor was the matter of settlement of plaintiff's guardianship of the injured child serviceable on any issue raised by the pleadings. It should not have been admitted over plaintiff's objection.

We are not able to find any tendency in the evidence supporting material averments of count 7 as amended. The court did not err in giving the affirmative charge thereon, as requested by defendant.

The errors indicated require the reversal of the judgment and the remandment of the cause.

Reversed and remanded.

NOTE.—*Failure to Warn Infant Employee as Negligence Not Within Parental Consent to Employment.*—The apparently unbroken line of authority is that consent by a parent for a child's employment in a dangerous business goes, so far as parents' right to recover for loss of services is concerned, to the assumption of the risks of employment. It does not, however, go to exonerating the employer for his negligence. But though this is true, it remains to inquire, whether the parent's consent to employment places the minor wholly upon the same footing as an adult employee, so far as the parents' right of recovery for loss of services is concerned. The principal case is seen to place the parent in a situation of rightful reliance upon the master's giving necessary warning to an inexperienced employee.

In Pecos & N. Tex. Ry. Co. v. Blasengame, 42 Tex. Civ. App. 66, 93 S. W. 187, the decision carries the inference that minority and inexperience require a warning and that mere consent to a minor's employment does not excuse the master's negligence in this regard. A prior decision of this same court, which held that consent did not bar recovery where the negligence was that of a fellow servant, according to the Texas rule, also held that the test of the necessity of warning was inexperience rather than minority. Thus it was said: "If plaintiff consented to the employment of his son, or with knowledge of such employment acquiesced therein, then" if appellant's agent "was reckless, negligent and an unsafe person for plaintiff's son to work with and his said son knew of the recklessness or unsuitableness of said" agents "prior to the time he was injured, and was capable of understanding and appreciating the danger of working with him, and by reason of said" agent's "recklessness or negligence was injured, then we think the plaintiff assumed the risk of such recklessness or negligence and cannot recover."

This quotation seems to state the matter quite strongly against the parent, in that it might be deemed to carry consent to work over to a management of which the consenting parent might be ignorant, whether the work be in its nature dangerous or otherwise. Thus in the case of Braswell v. Garfield Cotton Oil Mill Co., 66 S. E. 539, the Georgia Court of Appeals rules, that where a father consents to his son doing certain work and the latter is put to different and more dangerous work he has his cause of action despite the consent. In that case also it was said: "The age of the infant is not directly or primarily material, except in so far as it establishes the fact of his minority and the parent's right to his services. Even in a case where the maxim *volenti non fit injuria* would bar the minor himself from recovering, the defense under the maxim cannot be set up against the father for the reason that his consent was to take the risk of danger from one source, while the employer had exposed the child to a different and distinct danger."

The court rendering the decision in this principal case, while seen to deem failure to warn, negligence, yet appears from prior decision to hold, that mere minority is not the test of its being negligent not to warn, where a minor is engaged in a dangerous employment. If a minor has the appearance of a maturity that would give right to the presumption of capacity to understand work and the danger attendant thereon, he need not be warned. "It is a question for the jury to determine whether the master ought to have known of the necessity of instructions." Louisville & N. R. Co. v. Wilson, 50 So. 188.

In Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200, it is said: "It cannot be said that the master was negligent in failing to instruct his minor employee concerning the dangers attending his employment, when his duties are so simple and the danger so obvious that the minor could not fail to see them himself; nor when the minor is possessed of the requisite knowledge by other means. The rule requiring the master to instruct his servant, and to warn him, of danger, is only for the purpose of supplying with information which he is not presumed to have."

In Ryan v. Northern Pac. R. Co., 53 Wash. 209, 101 Pac. 880, it was said of the minor 17 years of age, that "he was a man in experience and comes within the rule "when the court can say as a matter of law, that a failure to warn him of the open and apparent dangers is not negdligence." This was a suit by the infant himself, but we do not imagine that it would be held that he ought to have been warned, if the father were suing. But it may be deduced that if warning ought to be given, mere consent for a minor to work does not excuse its not being given, but failure to give is a distinct negligence.

C.

JETSAM AND FLOTSAM.

RICHARD L. GOODE, AN ABLE JUDGE, RESIGNS.

The retirement of Judge Richard L. Goode, of of the St. Louis Court of Appeals, to resume the practice of law, we believe to be fully as worthy of comment as was that of Judge Simeon E. Baldwin, of Connecticut. Judge Goode never spoke from so exalted a place as did Judge Baldwin, for the court of which he was a member was not the highest court in his state; nor was his service so long. From the time, however, in January, 1900, that he, in the prime of life, took his seat on the bench to this day, when he retires by resignation, it has been in the mind of the lawyers of Missouri, that his constructive ability as a judge ought to have had its opportunity in some court, federal or state, of very last resort.

When we speak of constructive ability we mean this in the very best sense of the term. His mind is one disciplined by legal training and in building up he looked for foundation in legal principle. There was nothing of an iconoclastic spirit about him. He proceeded with steadiness of view to set forth the reason and spirit of law. Whatever fell before his calm logic was in distinguishing the plausible from the real, separating the tares of error from the wheat of truth. If this be not thought constructive work, we seem not to appreciate the confusion to which unscientific opinion writing has brought us.

Judge Goode, if we apprehend him aright, did not find fault with modern methods merely as departing from technical rules of the common law. But he knew that behind those technicalities was a science which must educate the mind, if precedents in decision are to have any distinctive value. Therefore, we think that, in practically all of the many opinions his busy career as a judge has produced, there appear a strict defining of the very question to be decided and clear exposition of supporting authority to the conclusion reached. Then he pursues discussion in lawyer-like language, which, if admitted to be ambiguous, would prove the futility of all legal literature as a science. There is no pedantry in his writings, but he was able, because he was grounded in the law, to achieve simplicity of speech.

Judge Goode's opinions may not be looked to for any innovation in doctrine, but he ever shows himself the trained lawyer, whether he is deciding a new point, extending the principle of controlling cases or urging that a controversy is fairly within previous adjudication. He yields to analogy to preserve consistency, as faithfully as he follows controlling precedent.

We have often been struck with his method of opening the way to the marshaling of authority for the support of his conclusions. It evinces his general grasp of legal principle and leads entertainingly to what we may term the operative parts of his opinion. In these preliminaries we find some admirable general statements. Thus in one of his early opinions, in discussing the right to regulate a public service corporation, he says: "Our fundamental principles are not threatened or questioned in any of these curtailments of unhampered individual action, because they are made to subserve rather than destroy free contractual rights."

Where it was sought to restrain excavation for a pond, because it was feared a nuisance would result, he said: "The spirit of our laws is chary about regulating conduct or restricting action. When this is done it is to preserve not to abridge freedom."

He was the first judge in Missouri to lay down the principle that: "When a business is complicated and the operations of different gangs of workmen entail danger to each other, which may be removed by practicable regulations, it is the duty of the employer to prescribe such rules." The conditions of such prescribing could not be stated more tersely or comprehensively.

Many more such excerpts we might make did space permit. One feels in reading his opinions that the writer is limited only by the course of controlling precedents and that while he knows how to steer a clear course in their midst, he often would have delighted to have found many of the questions, which he had to regard as foreclosed, still res integrae, so that his reasoning might have a freer swing. It should, however, be deemed one of the most substantial benefits that a judge can render the law, if he keep the course of principle clear. Judge Goode's career may be summed up as that of a jurist firmly guided by an acquired sense of legal principle, which the genius of painstaking had made to seem intuitive.

N. C. C.

HUMOR OF THE LAW.

Judge John H. Miller, of Birmingham, Alabama, tells the following amusing anecdote of one of that interesting branch of the administration of law known as the justice of the peace.

"A certain rural justice," says Judge Miller, "had heard a great deal of the manner of Judge Henry A. Sharpe on the bench of the city court of Birmingham, and resolved to come to town and witness his trial methods.

"It happened that on the day the justice visited the court Judge Sharpe was trying a non-jury case. The apparent ease with which the judge announced his rulings on points of law and procedure while he sat back comfortably in his chair with his head resting on one hand delighted the country justice immensely.

"At the close of argument by the attorneys, Judge Sharpe announced that he would take the case under advisement and announce his decision next Monday.

"The justice came down from the court thoroughly delighted with Judge Sharpe's wisdom and methods. He returned home with his head full of new ideas for the conduct of his own court.

"A few weeks later he had a case of considerable local importance. It was fought out with zeal by the opposing attorneys. During the introduction of evidence and the argument of attorneys the justice imitated Judge Sharpe as far as was possible, even resting his head on his hand in an easy, indifferent manner.

"At the close of the argument he said, 'Gentlemen, I will take this case under advisement and next Monday I will announce my decision in favor of the plaintiff.'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Pendency of Another Action.—The pendency of another action for the same cause in the courts of another state is not a bar to judicial proceedings in this state. —Roberts v. Pratt, N. C., 68 S. E. 240.

2. **Acknowledgment**—Privy Examination.—If there was a defect in the privy examination of the wife of grantor she might, if she outlived him, claim her dower against a party claiming under the deed, but that would not concern a party not claiming under grantor.—Powers v. Baker, N. C., 68 S. E. 203.

3. **Adverse Possession**—Ouster.—There can be no ouster of the constructive possession of an older patentee except by actual adversary possession.—City of Richmond v. Jones, Va., 68 S. E. 181.

4.——Title of Entrymen.—Limitations will not run in favor of an occupant of land, the title of which is in the United States, as against the entryman until the latter has fully performed on his part.—Kimes v. Libby, Neb., 126 N. W. 869.

5. **Attachment**—Attorney's Fees.—Attorney's fees in procuring an affirmance of an order dismissing an attachment pursuant to a plea in abatement held recoverable in an action on the bond.—State ex rel Shipman, Mo., 128 S. W. 809.

6. **Bankruptcy**—Corporation Subject to Adjudication.—A corporation engaged in operating a boarding stable held not subject to bankruptcy adjudication as engaged principally in mercantile and trading pursuits.—In re Willis Cab & Automobile Co., U. S. D. C., S. D. N. Y., 178 Fed. 113.

7.——Distribution of Estate.—All taxes which were collectible from a bankrupt prior to his bankruptcy must be paid by his trustee before dividends to creditors, and it is immaterial that through the negligence of the officers charged with their collection taxes have been allowed to accumulate for years and until the aggregate amount with interest will absorb all or a large part of the estate.—In re Weissman, U. S. D. C., D. Conn., 178 Fed. 115.

8.——Distribution of Funds.—A bankrupt's trustee, having concluded a composition without notifying petitioner, of whose claim the trustee had notice, was liable personally to petitioner for the amount of his claim.—In re Cadenas & Co., U. S. D. C., S. D. N. Y., 178 Fed. 158.

9.——Jurisdiction.—Chancery jurisdiction of a court of bankruptcy is limited by Bankruptcy Act.—Nelson v. Svea Pub. Co., U. S. D. C., W. D. Wash., 178 Fed. 136.

10.——Liens by Legal Proceedings.—Bankruptcy Act held inapplicable to a lien merged in a title by the consummation of an execution sale.—Nelson v. Svea Pub. Co., U. S. D. C., W. D. Wash., 178 Fed. 136.

11.——Pleading.—That an amended pleading alleged that defendant had been adjudged a bankrupt in the federal court held not to affect proceedings in the state court instituted prior to the bankruptcy proceedings.—Bowman v. Strother, Mo., 128 S. W. 848.

12.——Preferences.—Bankruptcy Act does not authorize a bankrupt's trustee to recover property or its value sold under a creditor's execution; the creditor having no reason to believe that the bankrupt intended thereby to give a preference.—Nelson v. Svea Pub. Co., U. S. D. C., W. D. Wash., 178 Fed. 136.

13. **Banks and Banking**—Fraud.—Where directors and members of the discount committee of a bank offered a note to it which they had procured by fraud, but took no part in determining whether the bank should purchase the note, the bank was not charged with their knowledge of the fraud.—Lilly v. Hamilton Bank of New York, U. S. C. C. of App., Third Circuit, 178 Fed. 53.

14. **Bills and Notes**—False Representations. —Maker of a note held required to show by a fair preponderance of the evidence that he was not negligent in signing it in alleged reliance on false representations of another.—Minneapolis Brewing Co. v. Grathen, Minn., 126 N. W. 827.

15.——Forgery.—The drawer of a check or the maker of a note, being required to know his own signature, cannot recover payment to a holder in due course of a forged instrument.— Jones v. Miners' & Merchants' Bank, Mo., 128 S. W. 829.

16. **Boundaries**—Highways.—A municipality takes only an easement for highway purposes while the fee remains in the abutting owner.— Thorndike v. City of Milwaukee, Wis., 126 N. W. 881.

17. **Cancellation of Instruments**—Insane Persons.—An insane person on recovering a judgment vacating a contract for the sale of real estate held not liable for the value of improvements placed on the property by the purchaser. —Godwin v. Parker, N. C., 68 S. E. 208.

18. **Carriers**—Liability for Misdelivery.—Misdelivery by connecting carrier to party named as consignee by initial carrier without production of bill of lading held not to avoid the liability of the initial carrier to the consignor.—

Central American S. S. Co. v. Mobile & O. R. Co., Mo. 128 S. W. 822.

19.——Stopping Trains at Flag Station.—Railway company held bound to stop its trains on signal at a flag station according to custom.—Central of Georgia Ry. Co. v. Dutton, Ga., 68 S. E. 307.

20.——Uniformity of Rates.—The only standard measure possible to secure absolute uniformity in the rates of carriers is money.—State v. Union Pac. R. Co., Neb., 126 N. W. 859.

21. **Carriers of Freight**—Delivery of Freight.—Delivery of a carload of freight to the consignee on its private track held a matter of agreement between the consignee and carrier.—Brooks Mfg. Co. v. Southern Ry. Co., N. C., 68 S. E. 243.

22. **Carriers of Passengers**—Goods Checked.—Where a railroad company receives in its parcel room property for safe-keeping to be redelivered at the place of deposit, and makes a nominal charge, the contract is a bailment for the mutual benefit of the parties.—Fraam v. Grand Rapids & I. Ry. Co., Mich., 126 N. W. 851.

23.——Injury to Passengers.—That a passenger on a street car fell on the floor and was injured held insufficient to show negligence on the part of the street car company.—Rhea v. Minneapolis St. Ry. Co., Minn., 126 N. W. 823.

24. **Charities**—Validity.—A charitable trust held not defeated because the trustee named has no legal existence or is unable to accept or administer.—In re Crawford's Estate, Iowa, 126 N. W. 774.

25 **Chattel Mortgages**—Purchase Price.— A mortgage for the purchase price of goods held invalid as to attaching creditors if the purchaser retained possession with power to sell without accounting.—Jackson v. Burgess, Mo., 128 S. W. 821.

26. **Commerce**—Peddlers and Drummers.—The sale within the state of a frame for a portrait, made in another state to fill an order taken by a solicitor in the former state, held not to authorize imposition of license tax, where the order for the portrait contemplated its delivery in an appropriate frame.—Dozier v. State of Alabama, U. S. S. C., 30 Sup. Ct. 649.

27. **Constitutional Law**—Exclusion of Non-Residents.—The state may exclude non-residents altogether from fishing privileges in its waters.—People v. Setunsky, Mich., 126 N. W. 844.

28——Registration of Physicians.—Resident physicians or assistant physicians and students at hospitals and others will be exempted by Code from provisions for registration of physicians without rendering the statute invalid as denying equal protection of laws.—Watson v. State of Maryland, U. S. S. C., 30 Sup. Ct. 644.

29. **Contempt**—Defenses.—Ignorance of the law is not in itself a defense in a contempt proceeding, save where criminality or guilt depends upon the intention with which the act is done.—Carr v. District Court of Van Buren County, Iowa, 126 N. W. 791.

30. **Contracts**—Fraudulent Misrepresentation.—A fraudulent misrepresentation to vary a contract must relate to a material matter as to which the other party had a right to rely on and did rely to his injury; but, if means of information are equally accessible to both parties, they will be presumed to have informed themselves, and, if they have not, they must abide the consequences.—Delany v. Johnson, Ark., 128 S. W. 859.

31.——Offer and Acceptance.—Where plaintiff wrote defendant railroad that he had a claim against defendant's contractor, and that he would proceed to collect the same, if defendant did not settle the account, the words "expects to settle all bills," in a letter from defendant that the railroad company "expects to settle all bills" of the contractor, did not necessarily mean payment.—Cleveland, C., C. & St. L. Ry. Co. v. Shea, Ind., 91 N. E. 1081.

32.——Prima Facia Evidence.—Giving a note in settlement of claim for work under contract with knowledge of facts held to bar claim for damages for defect in work.—Houlette & Miller v. Arntz, Iowa, 126 N. W. 796.

33.——Rights Acquired.—Where a contract, by its conditions and legal effect, invests a party thereto with a right, it is the same as if the right had been expressly stipulated in the contract.—Noon v. Mironski, Wash., 108 Pac. 1069.

34.——Sufficiency.—Promise by principal contractors to pay subcontractor additional compensation if he would complete the work held based on sufficient consideration.—Evans v. Oregon & W. R. Co., Wash., 108 Pac. 1095.

35. **Corporations**—Acts of Officers.—The president of a corporation held without authority to extend the time for a payment provided for in a contract executed by him and the secretary pursuant to the authority of the board of directors.—Lochwitz v. Pine Tree Min. & Mill Co., Utah, 108 Pac. 1128.

36.——Permit to do Local Business.—A permit to do local business with a foreign company which has acquired property within the state cannot be revoked under Act Mo. March 13, 1907, and the company subjected to the penalties because it sues in federal court or moves a suit from the state court to the federal court.—Herndon v. Chicago, R. I. & P. Ry. Co., U. S. S. C., 30 Sup. Ct. 633.

37.——Stock Dividends.—On a transfer of shares of stock in a corporation, a reservation of a dividend to be declared in the future held to have reference to cash dividends only, and not to stock dividends.—Lancaster Trust Co. v. Mason, N. C., 68 S. E. 235.

38. **Costs**—Discretion of Court.—In an equity suit, the court may award costs in its discretion, or refuse to allow costs to either party.—Blassengame v. Boyd, U. S. C. C. of App., Fourth Circuit, 178 Fed. 1.

39. **Courts**—Dicta.—The language of a judicial opinion should be confined to and limited by the particular facts and issues of the case, all other statements therein being dicta, and not binding in subsequent cases.—Runk v. Thomas, 123 N. Y. Supp. 523.

40.——Discretion.—Whether or not the rule of stare decisis shall be followed is within the discretion of the court.—Hertz v. Woodman, U. S. S. C., 30 Sup. Ct. 621.

41.——Stare Decisis.—Affirmance in the federal supreme court on equal division of opinion is not authority for the determination of other cases.—Hertz v. Woodman, U. S. S. C., 30 Sup. Ct. 621.

42. **Covenants**—Building Line.—A front porch, consisting of an open frame structure, resting on brick piers, held not a breach of a building line covenant, under the rule that the language

of a deed is to be construed liberally in favor of the grantee.—Spilling v. Hutcheson, Va., 68 S. E. 250.

43. **Criminal Law**—Pleading.—Unless manifestly unjust, the court may refuse leave to withdraw a plea of guilty of murder in the first degree and enter a plea of not guilty.—State v. Stephenson, W. Va., 68 S. E. 286.

44. **Criminal Trial**—Instructions. — An instruction on the defence of alibi held not objectionable as failing to specify the particular place at which defendant testified he was at the time of the homicide.—Mass v. State, Tex., 128 S. W. 394.

45. **Damages**—Liquidated Damages.—It is not essential to the validity of a liquidated damage clause in a contract that it should be reciprocal. —Shubert v. Sonheim, 123 N. Y. Supp. 529.

46. **Death**—Husband and Wife.—Husband as administrator of a deceased feme covert held not precluded from recovering damages for her wrongful death because as husband he was entitled to her earnings.—Hunter v. Southern Ry. Co., N. C., 68 S. E. 237.

47. **Dedication**—Effect.—A conveyance of the fee to a municipality in trust for specified uses held to leave no personal interest in the grantor, and the remedy for misuser or diversion is in equity.—Thorndike v. City of Milwaukee, Wis., 216 N. W. 881.

48. **Deeds**—Construction.—If there are repugnant clauses in a deed, the first clause will control.—Fortune v. Hunt, N. C., 68 S. E. 213.

49.——Construction.—The whole deed, as well as the acts of the parties, should be looked to to determine the intent of the deed.—Turner v. Creech, Wash., 108 Pac., 1084.

50. **Divorce**—Custody of Children.—In the disposition of a child the wishes of the parents should receive only subordinate consideration; the welfare of the child is paramount.—Tatum v. Davis, Mo., 128 S. W. 766.

51. **Easements**—Private Right of Way.—On proof of open, uninterrupted, continuous, and exclusive use of a right of way for more than 20 years, the owner must rebut the presumption by showing permission or license, or denials or objections to the use.—Williams v. Green, Va., 68 S. E. 253.

52. **Eminent Domain**—Taking of Private Property.—The taking of a creek which is a public highway held not to entitle riparian owners to compensation under Const. art 1, sec. 6.—Champlain Stone & Sand Co. v. State, 123 N. Y. Supp. 546.

53. **Equity**—Fraudulent Conveyances. — On suit to set aside a mortgage from husband to wife as fraudulent, held she could testify whether she intended to defraud his creditors.—Sanford, Chamberlain & Albers Co. v. Eubanks, N. C., 68 S. E. 219.

54.——Jurisdiction.—Equity has jurisdiction of a suit by a corporation against its managing agent to require an accounting in respect to his management of its property, even though the ultimate object sought is to obtain a money judgment.—Providence Min. & Mill. Co. v. Nicholson, U. S. C. C. of App., Eighth Circuit, 178 Fed. 29.

55.——Limitations.—When a legal demand is cognizable in equity, limitations will be observed by the equity court.—Crawford's Adm'r v. Turner's Adm'r, W. Va., 68 S. E. 179.

56.——Mistake of Law.—A simple mistake by a party as to the legal effect of a transaction is not ground for equitable relief.—Euler v. Schroeder, Md., 76 Atl. 164.

57. **Evidence**—Attempts to Suppress Testimony.—In an action for death of plaintiff's son, defendant could call plaintiff as a witness and examine him, to show an attempt to suppress material testimony.—Davis v. Boston & M. R. R., N. H., 76 Atl. 170.

58.——Failure to Call Witness.—The nonproduction of witnesses when witnesses are procurable creates a presumption that their testimony, if procured, would be unfavorable.—Norguet v. Paramount Worsted Mills, U. S. C. C., D. R. I., 177 Fed. 970.

59.——Judicial Notice.—Judicial notice is taken of an act of congress restoring Indian reserved lands to the public domain.—Sowards v. Meagher, Utah, 108 Pac. 1112.

60.——Weight of Evidence.—Affirmative testimony supported by corroborating circumstances is more convincing than the negative testimony of one who does not remember.—Lower Terrebonne Refining & Mfg. Co. v. Barrow, La., 52 So. 487.

61. **Executors and Administrators**—Burden of Proof Payment.—Defendant, in a suit by an administrator to foreclose a mortgage, which, with the note secured was found in intestate's possession, held to have the burden of proving payment.—Chamberlain v. O'Leary, Mich., 126 N. W. 831.

62.——Collateral Attack.—A judgment of the probate court granting letters of administration held not subject to collateral attack.—Farmer v. Saunders, Tex., 128 S. W. 941.

63.——Recovery of Money Paid.—An administratrix held entitled to recover from a creditor excess paid to him over pro rata share under belief that the estate was solvent.—Woodruff v. H. B. Claflin Co., N. Y., 91 N. E. 1103.

64. **False Imprisonment**—Justification. — A complaint, on which was issued and to which was attached a warrant for arrest, being signed by no one, held to give no authority to issue the warrant, so that the latter afforded no justification for arrest thereunder.—Hazen v. Creller, Vt., 76 Atl. 145.

65. **Federal Courts**—Decisions of State Courts. —A motion to quash indictment against a negro for disqualification of the grand jurors, caused by a change in the state constitution respecting qualifications of electors alleged to deny Act Cong. June 25, 1868, held not to present any question of the denial of a federal right.—Franklin v. State of South Carolina, U. S. S. C., 30 Sup. Ct. 640.

66.——District of Suit.—A suit for a commonlaw tort cannot be maintained against a corporation in a federal court, in a district of which neither plaintiff nor defendant is an inhabitant.—Ware-Kramer Tobacco Co. v. American Tobacco Co., U .S. C. C., E. D. N. Car., 178 Fed. 117.

67.——Jurisdiction.—A federal court has no jurisdiction to forfeit a street railway company's franchise granted under the legislative authority of a sovereign state.—People of State of New York v. Bleecker St. & F. F. R. Co., U. S. C. C., S. D. N. Y., 178 Fed. 156.

68. **Forgery**—Evidence.—That a check was returned by a bank with a slip stating that the indorsement was a forgery was not competent

proof that any indorsement was a forgery.—People v. Ghiggeri, 123 N. Y. Supp. 489.

69. **Homicide**—Dying Declarations.—Evidence of a physician called to attend deceased after she was shot by her husband, as to endearments between them after the shooting, held admissible.—People v. Alexander, Mich., 126 N. W. 837.

70.—Manslaughter.—Wherever a homicide is neither justifiable nor malicious, it is manslaughter; and, if intentional, it is voluntary manslaughter.—Mixon v. State, Ga., 68 S. E. 315.

71. **Husband and Wife**—Duty of Wife to Contribute.—Where the wife has not reserved to herself the administration of her separate estate, she is not bound to contribute to the expenses of the marriage.—Crochet v. Dugas, La., 52 So. 495.

72.——Joint Action.—Husband and wife jointly in replevin held not entitled to recover personal property owned by them in severalty.—Gowan v. Stevens, Vt., 76 Atl. 147.

73. **Improvements**—Effect. — Permanent improvements upon land become part of it, and the owner must take notice that liens affecting the fee attach to such improvements.—Nixdorf v. Blount, Va., 68 S. E. 258.

74. **Indemnity Insurance**—Notice.—A provision in a policy issued by a foreign insurance company that notice to its agent shall not be notice to it held unreasonable.—United Zinc Cos. v. General Accident Assur. Corporation, Limited, of Perth, Scotland, Mo., 128 S. W. 836.

75. **Injunction**—Action on Bond.—Plaintiff, in an action on an injunction bond, is entitled to recover such damages as are the natural and proximate result of the wrongful act of which he complained.—Whitehead v. Cape Henry Syndicate, Va., 68 S. E. 263.

76.——Forfeiture of Lease.—Where a lease provided for a forfeiture and right of entry, an entry thereunder constituted a forfeiture, and the possession, if retained, entitled the landlord to sue to enjoin against continued trespasses.—Nelson v. Kelley, Mo., 128 S. W. 832.

77.——Grounds.—Mandatory injunction for abatement of building covenant held not to be refused, as involving hardship on defendant, nor on the ground that plaintiff has a remedy at law.—Spilling v. Hutcheson, Va., 68 S. E. 250.

78.——Violation.—One may be punished for violating an injunction of which he has actual notice, though it was not served on him.—Carr v. District Court of Van Buren County, Iowa, 126 N. W. 791.

79. **Interest**—Keeping Tender Good.—To discharge interest, a tender must be kept good by payment into court.—Le Vine v. Whitehouse, Utah, 109 Pac. 2.

80. **Interstate Commerce**—Stoppage of Trains at Junction Points.—The requirement that passenger trains shall stop at all junction points of other roads, held an unlawful burden on interstate commerce.—Herndon v. Chicago, R. I. & P. Ry. Co., U. S. S. C., 30 Sup. Ct. 633.

81. **Judgment**—Fraud.—In an action on the judgment of a sister state, defendant may plead fraud in the procurement thereof.—Roberts v. Pratt, N. C., 68 S. E. 240.

82. **Judgment**—Full Faith and Credit. — A judgment against a foreign corporation based on service of process on an agent appointed to receive service is entitled to the full faith and credit in another state as it is in the state where rendered.—Voliva v. Richmond Cedar Works, N. C., 68 S. E. 200.

83.——Time of Entry.—A clerk's entry as to the date of the original decree is not a verity; parol evidence being admissible to correct it.—Manion v. Brady, Iowa, 126 N. W. 801.

84. **Larceny**—Definition of Offense.—The word "steal" or "stealing" in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated felonious, and imports the common-law offense of larceny.—State v. Richmond, Mo., 128 S. W. 744.

85. **Lewdness**—Octoroons.—An octoroon is not "a person of the negro or black race" within Act No. 87 of 1908, sec. 1.—State v. Treadaway, La., 52 So. 500.

86. **Libel and Slander**—Privileged Communication.—A letter written by the county superintendent of schools of a county to the state superintendent as to an applicant for a state certificate held a qualifiedly privileged communication.—Tanner v. Stevenson, Ky., 128 S. W. 878.

87. **Licenses**—Taxing Occupations.—The state may tax all or any occupations or business carried on within its boundaries, imposing the burden upon some and passing by others, and only considerations of general policy determine such selections; there being no restriction unless it be imposed by the Constitution.—City of Seattle v. Dencker, Wash., 108 Pac. 1086.

88. **Life Insurance**—Validity of Assignment.—Assignment of a life policy is not enforceable if through intoxication or insanity assignor is unable to understand the consequences of his act.—Searles v. Northwestern Mut. Life Ins. Co. of Milwaukee, Iowa, 126 N. W. 801.

89. **Limitation of Actions**—Constructive Trusts. —Where, on the death of an express trustee, his widow took possession of the trust property in apparent hostility to the trust, the 10-year limitation applicable to equitable actions commenced to run, as against her, either at the termination of the express trust or when she took possession.—Finnegan v. McGuffog, 123 N. Y. Supp. 539.

90.——Party Entitled to Plead Limitations.—Generally one creditor may set up limitations to defeat the demand of a co-creditor; but, to sustain the plea, it must be shown that the co-creditor's debt is barred as between himself and the debtor.—Monk v. Exposition Deepwater Pier Corporation, Va., 68 S. E. 280.

91.——Prescription.—Prescription is not interrupted by the service of citation on Saturday afternoon, a day of public rest, under Acts 1904, No. 3.—Rady v. Fire Ins. Patrol of New Orleans, La., 52 So. 491.

92. **Mandamus**—Illegal Claim.—Mandamus will not lie to enforce an illegal claim.—Edwards v. Auditor General, Mich., 126 N. W. 853.

93. **Marriage**—Ratification.—Marriage cannot be invalidated on allegation of violence or threats, where plaintiff ratified the marriage by cohabiting with defendant.—Boutterie v. Demarest, La., 52 So. 492.

94. **Master and Servant**—Assumed Risk. — A servant did not assume the risk of injuries by a defect in a machine of which he had no knowledge, and the existence of which he had no reason to suspect.—Deary v. Hecla Co., Mich., 126 N. W. 846.

95.——Discharge Before Expiration of Term.—A servant who was dismissed without cause during the performance of an entire contract cannot by waiting till the end of the term for which he was employed sue in assumpsit for wages, as such, for the portion of the term after his dismissal.—Derosia v. Firiana, Vt., 76 Atl. 153.

96.——Safe Place to Work.—A master is under no duty to provide a safe place to work where the dangers from the place of work arise from the changing conditions in the progress of the

work.—Dunn v. Great Lakes Dredge & Dock Co., Mich., 126 N. W. 833.

97.——Vice Principal.—Authority to hire and discharge men, though not a criterion of vice-principalship, is a proper circumstance bearing on that question.—Bayles v. Savery Hotel Co., Iowa, 126 N. W. 808.

98. **Mechanics' Liens**—Enforcement.—In a suit to enforce a mechanic's lien, subsequent incumbrancers held not necessary parties.—Monk v. Exposition Deepwater Pier Corporation, Va., 68 S. E. 280.

99. **Municipal Corporations**—Condition of Streets.—A village is required only to employ reasonable diligence to keep its streets in a reasonably safe condition.—Walters v. Village of Exeter, Neb., 126 N. W. 868.

100.——Cutting Trees.—A city cannot authorize one to damage trees between the street and sidewalk, belonging to adjacent property owners, without making compensation.—Brahan v. Meridian Home Telephone Co., Miss., 52 So. 485.

101.——Ordinance Regulating Width of Tires.—An ordinance regulating the width of tires held not discriminating, in derogation of a common right, nor unreasonable.—State ex rel. St. Louis Transfer Co. v. Clifford, Mo., 128 S. W. 755.

102.——Use of Streets.—Where a town granted to a telephone company a license to erect its lines in the streets, etc., neither the company nor the town nor any successor to its rights and powers over the streets and alleys of the town could repudiate the contract or take back the grant without the company's consent.—People v. Chicago Telephone Co., Ill., 91 N. E. 1065.

103. **Negligence**—Humanitarian Doctrine.—In an action for negligence, the issues of sole negligence and of negligence under the humanitarian doctrine may be submitted.—Shipley v. Metropolitan St. Ry. Co., Mo., 128 S. W. 768.

104. **New Trial**—Surprise.—A party cannot be "surprised" at the evidence of his adversary, though false, if within the issues.—National Stamping & Electric Works v. Wicks, Mo., 128 S. W. 775.

105. **Obstructing Justice**—Obstructing Execution of Writ.—An obstruction of an officer attempting to execute a writ of search and seizure held to be an offense, although the writ was issued without the filing of an affidavit.—Appling v. State, Ark., 128 S. W. 866.

106. **Parties**—Defect of Parties.—Where the defect of parties appears on the face of the complaint, the objection must be taken by demurrer.—Buckles v. Reynolds, Wash., 108 Pac. 1072.

107. **Principal and Agent**—Deeds.—A deed of land by an attorney in fact of the owner, signed and sealed by the attorney individually, and not by him as attorney in fact, does not bind the owner.—Woodbury v. King, N. C., 68 S. E. 221.

108. **Railroads**—Injury to Persons on Track.—The mere failure of defendant to have on its engine a headlight did not constitute negligence when other equally efficient means of warning one on the track were used.—Hargrave's Adm'r v. Shaw Land & Timber Co., Va., 68 S. E. 278.

109.—Use of Right of Way.—A railroad company may grant a license or easement on its right of way not interfering with the operation of the road.—Hastings v. Chicago, R. I. & P. Ry. Co., Iowa, 126 N. W. 786.

110. **Religious Societies**—Land Dedicated to Pious Use.—The dedication of land in pais to a pious use does not transfer the fee, but only the use; the fee remaining in the dedicator and his heirs or assigns.—Hamlin v. Property in Webster, Me., 76 Atl. 163.

111. **Removal of Causes**—Federal Courts.—An action to forfeit the franchises of certain street railway companies was not removable to the federal courts on the theory that it arose under the Constitution and laws of the United States because federal receivers were in possession of the property of the lessee of the rights sought to be forfeited.—People of State of New York v. Bleecker St. & F. F. R. Co., U. S. C. C., S. D. N. Y., 178 Fed. 156.

112.——Separable Controversies.—Whether two defendants were erroneously joined, and whether a separable controversy existed between plaintiff and each of the defendants, so as to justify a removal to the federal court by one of them, depends on the case made by the complaint.—Galeotti v. Diamond Match Co., U. S. C. C., N. D. Cal., 178 Fed. 127.

113. **Sales**—Delivery.—Where brokers sent a seller a contract previously signed by the buyer, and on its receipt the seller signed it and returned it to them it constituted a delivery.—Groneweg & Schoentgen Co. v. Estes, Mo., 128 S. W. 786.

114.——Identification of Property.—A contract of sale for a large number of articles not identified in the contract will pass title if the articles sold are separated and understood by the parties.—Pitts v. Curtis, N. C., 68 S. E. 189.

115.——On Approval.—Where the purchaser of a machine, on approval, refused to return the same after it had failed on the trial to work according to contract, the sale became absolute, and he is liable for the price.—Brown v. Austin Western Co., Va., 68 S. E. 184.

116. **States**—Foreign Corporations.—The immunity of a state from suit is not violated by a suit in the federal court by a foreign railway company to restrain a prosecuting attorney from enforcing a state statute and to restrain the Secretary of State in revoking the company's right to do local business.—Herndon v. Chicago, R. I. & P. Ry. Co., U. S. S. C., 30 Sup. Ct. 633.

117. **Street Railroads**—Care Required.—A traveler on a city street, when confronted by a car approaching rapidly in violation of the city's ordinances, held only required to use reasonable care.—Burns v. New York & L. I. Traction Co., 123 N. Y. Supp. 474.

118. **Subrogation**—Persons Entitled.—Subrogation can be invoked by a party who has extinguished a charge on land believing that he had an interest in discharging the same.—Foster v. Williams, Mo., 128 S. W., 797.

119. **Taxation**—Tax Titles.—Persons owing no duty to the owner of land or the state to pay taxes thereon held entitled to acquire separate tax deeds for delinquent taxes for different years, and such titles may vest in one person.—Carmell v. Parr, Mich., 126 N. W. 835.

120. **Telegraphs and Telephones**—Failure to Deliver Message.—Plaintiff, who called up a doctor over the line of defendant telephone company, and talked with defendant's operator, who claimed to be the doctor, held not guilty of contributory negligence as a matter of law in not sooner thereafter trying to get medical aid.—Texas Central Telephone Co. v. Owens, Tex., 128 S. W. 926.

121. **Torts**—Unlawful Assemblage.—Certain persons who visited defendant to remonstrate to him concerning his abuse of a horse held not to be guilty of any unlawful assemblage or act, and hence were not liable to plaintiff for damages on account of illness produced by fear from their presence.—Beck v. Luers, Iowa, 126 N. W. 811.

122. **Trade Marks and Trade Names**—Unfair Competition.—Defendant's manufacture and sale of tooth brushes under the name "Sta-Kleen," printed in the same position and character of letters and on the same character of package as used by complainant in selling brushes under the name "Keepclean," held unlawful competition.—Florence Mfg. Co. v. J. C. Dowd & Co., U. S. C. C. of App., Second Circuit, 178 Fed. 73.

123. **Trover and Conversion**—Conversion of Check.—Trover for the conversion of a check must be brought in the name of the real owner, and not necessarily in the name of the payee.—White v. Bonney, Va., 68 S. E. 273.

124. **Wills**—Partial Intestacy.—Ultimate intestacy as to a part of the residuary estate held not to prevent the general scheme of the will from being carried out so as to invalidate the whole residuary clause.—Chastain v. Dickinson, 123 N. Y. Supp. 513.

125.——What Law Governs.—Where a will and codicil made in Michigan was offered for probate in New York, whether either or both should be admitted depended on the New York court's determination of the New York law, guided by the testamentary validity of such papers in Michigan.—Higgins v. Eaton, U. S. C. C., N. D. N. Y., 178 Fed. 153.